Supreme Court, U.S.
FILED
NOV 27 2001
OFFICE OF THE CLERK

No. 00-1737

IN THE

Supreme Court of the United States

WATCHTOWER BIBLE AND TRACT SOCIETY OF NEW YORK, INC., and WELLSVILLE, OHIO, CONGREGATION OF JEHOVAH'S WITNESSES, INC.,

Petitioners,

v.

VILLAGE OF STRATTON, OHIO, and JOHN M. ABDALLA, Mayor of the Village of Stratton, Ohio, in his official capacity,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* BRENNAN CENTER FOR JUSTICE IN SUPPORT OF NEITHER PARTY

BURT NEUBORNE
DEBORAH GOLDBERG
BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(212) 998-6730

RICHARD L. HASEN
Counsel of Record
919 South Albany Street
Los Angeles, CA 90015
(213) 736-1466

Attorneys for Amicus Curiae

170827

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

24 pp

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of the *Amicus Curiae* 1

Introductory Statement and Summary of Argument 2

Argument 4

I. This Court Has Established Narrow Exemptions From Reporting and Disclosure Requirements. 4

A. Reporting Requirements in Candidate Elections Are Constitutional, Except As Applied to Speakers Who Face a Reasonable Probability of Harassment. 5

B. Disclosure Requirements Are Constitutional, Except As Applied to Individual Leafleteers and Others Engaged in One-on-One Communications About Ballot Measures 7

II. The Lower Federal and State Courts Need Clarification of the Meaning of *McIntyre*. 12

A. Courts Are Divided in Their Interpretations of *McIntyre*. 13

B. Misreadings of *McIntyre* Are Preventing States from Achieving Compelling Governmental Interests Recognized by This Court. 16

Conclusion 19

TABLE OF AUTHORITIES

Cases

Arkansas Right to Life State Political Action Committee v. Butler, 29 F. Supp. 2d 540 (W.D. Ark. 1998), *cert. denied*, 525 U.S. 1145 (1999) 16

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982) 6

Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) ..... 9 & n.2, 10, 11

Buckley v. Valeo, 424 U.S. 1 (1976) 3, 5, 6

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 7

Citizens for Responsible Government State Political Action Committee v. Davidson, 236 F.3d 1174 (10th Cir. 2000) 16

Federal Election Commission v. Public Citizen, 268 F.3d 1283, 2001 WL 1193892 (11th Cir. Oct. 10, 2001) . 13

Federal Election Commission v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995). 13, 14

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). 6, 7

Gable v. Patton, 142 F.3d 940 (6th Cir. 1998), *cert. denied*, 522 U.S. 1177 (1999) ..... 14 n. 5

Griset v. Fair Political Practices Commission, 23 P.3d 43 (Cal. 2001), *rev'g* 82 Cal. Rptr. 2d 25 (Cal. Ct. App. 1999). 3, 15

Kentucky Right to Life v. Terry, 108 F.3d 637 (6th Cir.), *cert. denied*, 522 U.S. 860 (1997) 14

McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995). 2, 7, 8, 9, 17

NAACP v. Alabama, 357 U.S. 449 (1958) 6

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000) 3

Seymour v. Elections Enforcement Commission, 762 A.2d 880, 889 (Conn. 2000). ..... 14 n. 4

State v. Doe, -- S.W.3d. --, 2001 WL 1223732 (Tex. App. Oct. 16, 2001) 15

Stewart v. Taylor, 953 F. Supp. 1047 (S.D. Ind. 1997) 16

Yes for Life Political Action Committee v. Webster, 74 F. Supp. 2d 37, (D. Me. 1999) 16

Federal Statutes

2 U.S.C. § 434(a) 4

2 U.S.C. § 441d(a) 4, 13

Other

Stratton, Ohio, Ordinance 1998-5 2

INTEREST OF THE *AMICUS CURIAE*

With the consent of the parties, the Brennan Center for Justice at NYU School of Law submits this brief *amicus curiae* in support of neither party.[1] The letters of consent have been filed with the Clerk of the Court.

The Brennan Center is a nonpartisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts, legislatures, and citizens in developing practical solutions to difficult problems in areas of special concern to Justice William J. Brennan, Jr. The Center has participated as *amicus curiae* or as counsel for a party or *amici* in a number of cases decided by this Court on issues affecting core ideals of democratic government, including *FEC v. Colorado Republican Federal Campaign Committee* (*I* and *II*), *Nixon v. Shrink Missouri Government PAC*, and *Anderson v. Roe*. The Center takes an interest in this case because of the implications of this Court's interpretation of *McIntyre v. Ohio Elections Commission* for laws throughout the nation that require campaign finance reporting and disclosure of mass advertising sponsors in federal and state elections.

---

[1] Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authorized this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

This case involves a First Amendment challenge of a local ordinance regulating "uninvited peddling and solicitation upon private property." Stratton, Ohio, Ordinance 1998-5 (annexed as Appendix E to Petition for a Writ of Certiorari). The ordinance requires individuals who wish to engage in canvassing at private residences to obtain a permit from the municipality and to display that permit, which contains the canvasser's name, upon demand by the police or person canvassed. Petitioner contends that the ordinance violates its members' right to engage in anonymous door-to-door advocacy, relying upon this Court's decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

Amicus submits this brief in support of neither party to alert this Court to confusion that the decision in *McIntyre* has created among lower federal courts and state courts and to urge this Court to eliminate that confusion in deciding this case. *Amicus* urges this Court to clarify that federal, state, and local election-related reporting and disclosure requirements are constitutional, with only very narrow exceptions. Persons who face harassment are exempt from both reporting and disclosure requirements. But this Court has never suggested that anyone else is exempt from reporting, and the only speakers who have been held exempt from disclosure requirements on grounds other than potential harassment are lone pamphleteers and others engaged in one-on-one communications in ballot measure elections. *See* Point I.

These clarifications are needed because some lower federal courts and state courts have misconstrued *McIntyre* as

creating a constitutional right to virtually complete anonymity in elections, contrary to *McIntyre* itself and to other decisions of this Court. For example, one California appellate court held that, under *McIntyre*, California could not require a *candidate for office* who sent a *mass mailing* to voters attacking his opponent to disclose his identity on the face of the mailing. The California Supreme Court later reversed this case on jurisdictional grounds, without addressing the merits. *Griset v. Fair Political Practices Commission*, 23 P.3d 43 (Cal. 2001), *rev'g* 82 Cal. Rptr. 2d 25 (Cal. Ct. App. 1999). Courts in Arkansas, Colorado, Indiana, Maine, and Texas have similarly misapplied *McIntyre* to invalidate a number of common campaign finance disclosure laws. *See* Point II.

The interpretation of *McIntyre* defended in this brief *amicus curiae* advances compelling governmental interests while safeguarding fundamental First Amendment rights. Clarifying that *McIntyre* does not upset commonplace reporting and disclosure requirements, s*ee Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 430 (2000) (Thomas J., dissenting) ("States are free to enact laws that . . . require the disclosure of large contributions . . . ."), respects the state's interests in providing information and enforcing other campaign finance laws and, in the case of candidate elections, serves an anti-corruption interest as well. At the same time, recognizing the specific exceptions described in Point I continues this Court's protection of pamphleteers, petition circulators, and others engaged in one-on-one communications from heat of the moment harassment. *Amicus* therefore urges this Court to clarify that, notwithstanding *McIntyre*, reporting and disclosure requirements that states employ as a "means of curbing the evils of campaign ignorance and corruption," *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (*per curiam*), are constitutional, except as applied in those specific circumstances.

ARGUMENT

I.

THIS COURT HAS ESTABLISHED NARROW EXEMPTIONS FROM REPORTING AND DISCLOSURE REQUIREMENTS.

On the federal, state, and local level, governments guarantee voters access to election-related information in two ways. First, persons and organizations engaged in certain electoral activities, such as raising contributions or spending money on campaigns, may be required to file *reports* with public agencies. *See, e.g.*, 2 U.S.C. § 434(a) (setting forth reporting requirements for treasurers of political committees). Second, those persons and organizations may be required to *disclose* certain information directly to the recipients of election-related communications. *See, e.g.*, 2 U.S.C. § 441d(a) (requiring financiers of campaign advertising and solicitors of contributions to disclose in the communication their identity and whether the communication was authorized by any candidate). Throughout this brief we will refer to the first set of laws as "reporting requirements" and the second set of laws as "disclosure requirements."

As we explain below, this Court's two leading cases on reporting and disclosure, *Buckley* and *McIntyre*, establish the principal constitutional parameters for both types of requirements. Persons who face harassment are exempt from both reporting and disclosure requirements. But this Court has never suggested that anyone else is exempt from reporting, and the only speakers who have been held exempt from disclosure requirements on grounds other than potential harassment are lone pamphleteers and others engaged in one-on-one communications in ballot measure elections.

A. Reporting Requirements in Candidate Elections Are Constitutional, Except As Applied to Speakers Who Face a Reasonable Probability of Harassment.

In *Buckley*, 424 U.S. at 60-84, this Court upheld the broad reporting requirements of the Federal Election Campaign Act ("FECA") against claims that the law infringed on First Amendment associational and free speech rights. The Court held that three compelling governmental interests justified reporting requirements: (1) informing voters about a candidate's likely future performance and possible allegiances; (2) deterring actual and apparent corruption; and (3) enforcing contribution limits. *See id.* at 66-68. Under *Buckley*, "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. But . . . there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Id.* at 66 (citation omitted).

Buckley's approach to reporting requirements is notable for its deference to legislative judgments. The plaintiffs had challenged FECA's requirements that political committees maintain records with the name and address of those who make annual contributions in excess of $10 and report the name, address, occupation, and employer of those who contribute, in the aggregate, more than $100 annually. The Court agreed that these thresholds were "indeed low," but concluded that "we cannot require Congress to establish that it has chosen the highest reasonable threshold." *Id.* at 83. To the contrary, *Buckley* held that drawing the line was "best left in the context of this complex legislation to congressional discretion." *Id.*

The *Buckley* Court also rejected an overbreadth challenge based on the applicability of the requirements to minor as well as major political parties. The plaintiffs claimed that the First Amendment rights of minor parties were seriously burdened by the requirement that they disclose contributors, because their supporters were more susceptible to harassment. But the Court refused to carve out a blanket exemption for minor parties. *See id.* at 68-74.

While rejecting the facial constitutional challenge, *Buckley* recognized that the federal reporting requirements would be unconstitutional as applied to minor parties that could establish a reasonable probability of harassment. The Court noted that the NAACP had been excused from producing its membership lists after demonstrating that "'revelation of the identity of its rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.'" *See id.* at 69 (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)). "No record of harassment on a similar scale was found" in *Buckley*, *id.*, and the Court therefore refused to except minor parties generally from federal reporting requirements. But the Socialist Workers Party made the requisite showing in *Brown v. Socialist Workers '74 Campaign Committee*, and the Court recognized that party's right to an exemption. *See* 459 U.S. 87, 102 (1982).

Two years after *Buckley*, this Court briefly reaffirmed the voters' compelling interest in electoral information, this time in ballot measure elections. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *Bellotti* involved a Massachusetts criminal statute that prohibited banking and business corporations from making contributions or

expenditures to influence the vote on ballot measure initiatives, unless the initiatives materially affected corporate assets, property, or business. The Court invalidated the ban on First Amendment grounds but recognized that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32; *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 n.4, 298-99 (1981) (noting that the government's interest in identifying the sources of support for and opposition to ballot measures could be met by an existing law requiring pre-election publication of a contributor list). Read together, *Buckley* and *Bellotti* affirm the constitutionality of reporting requirements in both candidate and ballot measure elections, except as applied to political players that can show a reasonable probability of harassment.

B. Disclosure Requirements Are Constitutional, Except As Applied to Individual Leafleteers and Others Engaged in One-on-One Communications About Ballot Measures.

This Court first considered the constitutionality of disclosure requirements in *McIntyre*, 514 U.S. 334. The Ohio Elections Commission had fined Margaret McIntyre for distributing unsigned homemade leaflets expressing Ms. McIntyre's opinion about an imminent local tax referendum. Ms. McIntyre's conduct violated an Ohio law prohibiting the circulation of unsigned documents designed to influence voters in an election. *See id.* at 338 n.3. Applying "exacting scrutiny," *id.* at 347, the Court held that Ohio could not justify a disclosure rule that prohibited even a lone pamphleteer like

Ms. McIntyre from anonymously distributing a leaflet about a ballot measure. *Id.* at 347-57.

Significantly, *McIntyre* distinguished the Ohio statute from laws requiring disclosure of the speaker's identity in two different situations. First, in candidate elections, the Court suggested that all disclosure requirements are constitutional, explaining that "[r]equired disclosures about the level of financial support a candidate has received from various sources are supported by an interest in avoiding the appearance of corruption . . . ." *Id.* at 354. The Court further stated: "In candidate elections, the Government can identify a compelling state interest in avoiding the corruption that might result from campaign expenditures. Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment . . . ." *Id.* at 356. The Court further recognized that the electorate's heightened informational interest in candidate elections justifies disclosure of information regarding both contributions to the candidate and "expenditures authorized by the candidate or his responsible agent." *Id.* at 354.

Second, in ballot measure elections, the Court recognized that disclosure rules could not constitutionally be applied to persons like Margaret McIntyre, a lone pamphleteer "acting independently and using only [her] own modest resources." *Id.* at 351. Thus, the Court distinguished the facts of *McIntyre* from those in *Bellotti*, noting that the rationale supporting disclosure of corporate spending in ballot measure campaigns "did not necessarily apply to independent communications by an individual like Mrs. McIntyre." *Id.* at 354. Because Ohio's disclosure rules failed to accommodate the Mrs. McIntyres of the world, the Court invalidated the law

as overbroad. But *McIntyre* "d[id] not thereby hold that the State may not in other, larger circumstances require the speaker to disclose its interest by disclosing its identity." *Id.* at 358 (Ginsburg, J., concurring).

Recently, in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), this Court sharply distinguished between the types of political activity to which the right to anonymity applies and the "other, larger circumstances" in which state reporting and disclosure laws may be applied constitutionally. In *ACLF*, a nonprofit public interest organization and individuals who regularly participated in Colorado's initiative and referendum process challenged a number of Colorado's petition requirements, including some reporting and disclosure requirements. The Court's decision in *ACLF* closely followed the reasoning in *Buckley* and *McIntyre*.

All nine Justices deciding *ACLF* agreed on the propriety of Colorado's law mandating the filing of reports disclosing of the names of initiative sponsors and the amounts spent gathering support for their initiatives.[2] The majority explained:

> In this regard, the State and supporting *amici* stress the importance of disclosure as a control or check on domination of the initiative process by affluent special interest groups. Disclosure of the names of initiative sponsors,

---

[2] The Court did strike down a requirement that initiative proponents list the identity of paid circulators and their income from circulation, noting: "The added benefit of revealing the names of paid circulators and amounts paid to each circulator 'is hardly apparent and has not been demonstrated.'" *ACLF*, 525 U.S. at 203.

> and of the amounts they have spent gathering support for their initiatives, responds to that substantial state interest.
>
> Through the disclosure requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words, voters will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'

Id. at 202-03 (citations omitted); *see also id.* at 214 (Thomas, J., concurring) ("The reporting provision as modified by the courts below ensures that the public receives information demonstrating the financial support behind an initiative proposal before voting."); *id.* at 224 (O'Connor J., joined by Breyer, J., concurring in the judgment in part and dissenting in part) ("The disclosure required here advances Colorado's interest in law enforcement by enabling the State to detect and to identify on a timely basis abuse or fraudulent circulators. Moreover, like election finance reporting generally, Colorado's disclosure reports provide facts useful to voters who are weighing their options."); *id.* at 233 (Rehnquist, C.J., dissenting) (stating that Colorado's disclosure requirements as a whole "serve substantial interests and are sufficiently narrowly tailored to satisfy the First Amendment").

In contrast, the Court struck down an identification-badge requirement for petition circulators, calling *McIntyre* "instructive" on this question and noting that both cases "involve a one-on-one communication." *ACLF*, 525 U.S. at 199. Colorado had tried to defend its name-badge requirement

on the ground that it enabled the public to identify, and the state to apprehend, petition circulators who engaged in misconduct. Significantly, the Court held that this interest was satisfied by Colorado's requirement that petition circulators provide a notarized affidavit containing the circulator's name, address and signature, upon filing completed petition sections. *See id.* at 198. The Court stated that the affidavit requirement "exemplifies the type of regulation for which *McIntyre* left room." *Id.* at 200. The Court further explained that the affidavit requirement provided necessary information without exposing the circulator to "heat of the moment" harassment. *Id.* at 199. In contrast, "the name badge requirement" forces circulators to reveal their identities at the same time they deliver their political message; "it operates when reaction to the circulator's message is immediate and 'may be the most intense, emotional, and unreasoned.'" *Id.* at 198-99 (citations omitted). *ACLF* confirms that disclosure laws are constitutional, provided that individuals who leaflet or engage in other one-on-one political advocacy (and thus risk harassment by the recipient of their communication) are not required to reveal their names while disseminating their message.[3]

---

[3] *ACLF* suggests that Stratton, Ohio could constitutionally require that canvassers obtain a permit but not that they display it upon demand.

II.

THE LOWER FEDERAL AND STATE COURTS NEED CLARIFICATION OF THE MEANING OF *MCINTYRE*.

Reading this Court's campaign finance reporting and disclosure cases together, it is clear that there is no general right to engage in election-related activity anonymously. Rather, states are free to impose reporting and disclosure requirements in candidate elections, unless there is a record of harassment. States are also free to impose reasonable reporting and disclosure requirements in ballot measure elections, except with respect to lone pamphleteers or when there is potential for harassment, whether from public hostility or from recipients of face-to-face communications.

Unfortunately, not all lower federal courts and state courts have understood the distinctions developed in this Court's reporting and disclosure cases. Although several federal Courts of Appeals have understood McIntyre's limited holding, a few courts have gone so far as to hold that *no disclosure requirements are constitutional*, even in *candidate elections* and even when *mass communications* (such as direct mail or television broadcasts) are used. As a result, states seeking to promote their interests in electoral integrity and voter information face a confusing and conflicting array of cases. Clarification of this important area of law is therefore of immediate urgency.

A. Courts Are Divided in Their Interpretations of *McIntyre*.

Three federal circuit courts have understood that *McIntyre* creates only a very limited exception to the government's ability to impose disclosure requirements. Two cases involved a federal disclosure requirement applicable to expenditures for communications expressly advocating the election or defeat of a clearly identified candidate for federal office and to contribution solicitations. *See* 2 U.S.C. § 441d(a). The specific provision at issue in those cases requires any such communication or solicitation that is not authorized by a federal candidate, an authorized political committee of a candidate, or its agents to state the name of the person who paid for the communication and that the communication is not authorized by any candidate or candidate's committee. *See id.* § 441d(a)(3). The third case involved a similar state law. All three upheld the challenged provisions.

Most recently, in *Federal Election Commission v. Public Citizen*, 268 F.3d 1283, 2001 WL 1193892 (11th Cir. Oct. 10, 2001) (*per curiam*), the Eleventh Circuit upheld the federal disclosure requirement as applied to expenditures. The court concluded that "the candidate authorization disclosure is narrowly tailored to serve the overriding governmental interest in assisting voters in evaluating the candidates." *Public Citizen*, 2001 WL 1193892, *1. One judge dissented, relying upon *McIntyre*.

In *Federal Election Commission v. Survival Education Fund*, the Second Circuit upheld the same provision as applied to solicitations. *See* 65 F.3d 285, 298 (2d Cir. 1995). That court held that the federal disclosure requirement was justified (1) to "enable[] the solicitee to contribute money to those

groups which truly reflect his or her beliefs," (2) to deter "clandestine corruption of candidates," and (3) to "ensure that private citizens, in responding to a solicitation, do not unintentionally violate FECA's contribution limitations." *Id.* at 297. The court further stated that the requirements were "far more narrowly tailored than those of the Ohio statute in *McIntyre*." *Id.* at 298.[4]

Finally, in *Kentucky Right to Life v. Terry*, 108 F.3d 637, 647-48 (6th Cir.), *cert. denied*, 522 U.S. 860 (1997), the Sixth Circuit considered the constitutionality under *McIntyre* of a Kentucky law providing that all campaign material expressly advocating the election or defeat of a clearly identified candidate must include the name and address of the individual or committee that paid for the communication. The Sixth Circuit agreed with the state that the law was justified because it "prevents actual and perceived corruption by immediately notifying the public of any possible allegiance a particular candidate may feel toward the publisher" and because it is "a method of detecting those expenditures which are not truly independent by providing a paper trail to detect violations by unscrupulous PACs routing expenditures through individuals." *Id.* at 648.[5]

---

[4] The Connecticut Supreme Court relied upon *Federal Survival Fund* in upholding a state disclosure law in candidate elections. *See Seymour v. Elections Enforcement Comm'n*, 762 A.2d 880, 889 (Conn. 2000). But, reflecting the current confusion about *McIntyre*, the court suggested the result might be different if the disclosure law involved ballot measure elections. *Id.* at 886-87.

[5] *See also Gable v. Patton*, 142 F.3d 940, 945 (6th Cir. 1998) (recognizing the possibility of "an as-applied constitutional challenge [to the Kentucky law] by someone convicted of distributing a small number of anonymous circulars"), *cert. denied*, 522 U.S. 1177 (1999).

Unfortunately, other federal and state courts have misconstrued *McIntyre* as holding that the government may *never* impose a disclosure requirement on *anyone*, even on candidates, political committees, or others engaged in mass election-related communications. For example, a California appellate court held that, under *McIntyre*, California could not require a *candidate for office* who sent a *mass mailing* to voters attacking his opponent to disclose his identity on the face of the mailing. Fortunately, the error of this case only temporarily undermined the state's interests in disclosure, because the California Supreme Court reversed the appellate court on jurisdictional grounds. *See Griset*, 23 P.3d at 702, *rev'g* 82 Cal. Rptr. 2d 25.

The California example is not isolated. Just this past October, a Texas appellate court struck down under *McIntyre* a state statute requiring one who has contracted to print or to publish a political advertisement -- in this case, as in *Griset*, a bulk mailing opposing a candidate in a candidate election --to identify the sponsor in the advertisement. *See State v. Doe*, -- S.W.3d. --, 2001 WL 1223732 (Tex. App. Oct. 16, 2001). Only the dissenting judge recognized that the Texas statute involved "larger circumstances" justifying disclosure under *McIntyre*, noting: "Without a disclosure requirement, it will be impossible for a state to punish corporate acts of illegal expenditures or contributions because an anonymous speaker/author can hide faceless behind an anonymous individual who contracts or agrees with the corporate printer, publisher, or broadcaster to distribute his message." *Id.* at *10 (Lagarde, J., dissenting).

These cases are among a host of others misreading *McIntyre* as preventing *any* disclosure of identifying information on the face of election-related material that is to be mailed, broadcast, or otherwise widely distributed. *See, e.g.*,

Citizens for Responsible Gov't State Political Action Comm. v. Davidson, 236 F.3d 1174, 1198-1200 (10th Cir. 2000) (striking down, on authority of *McIntyre* and *ACLF*, Colorado requirement that donors who make independent expenditures in excess of $1,000 include identifying information in any political message produced by the expenditure); *Yes for Life Political Action Comm. v. Webster*, 74 F. Supp. 2d 37, 42 (D. Me. 1999) ("I conclude that so long as *McIntyre* is binding precedent, Maine may not constitutionally require a PAC to identify itself in advocacy materials it authorizes or pays for."); *Arkansas Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540, 547-550 (W.D. Ark. 1998) (striking down Arkansas statute requiring any person making an independent expenditure to identify itself in all communications and state that the communication is not authorized by a candidate or candidate committee), *cert. denied*, 525 U.S. 1145 (1999); *Stewart v. Taylor*, 953 F. Supp. 1047, 1053-56 (S.D. Ind. 1997) (striking down under *McIntyre* an Indiana law requiring sponsor identification and an authorization statement on any advertisement in support of or in opposition to a candidate, except where disclosure is impractical because of the size or shape of the item). These misinterpretations have created an unnecessary uncertainty about the constitutionality of disclosure provisions that only this Court can resolve.

B. Misreadings of *McIntyre* Are Preventing States from Achieving Compelling Governmental Interests Recognized by This Court.

As a result of widespread confusion among the lower courts, some jurisdictions are governed by rulings that *McIntyre* created only a narrow exemption to disclosure requirements, applicable to lone pamphleteers and others engaged in one-on-one communications in ballot measure elections, while others

operate under decisions that misread *McIntyre* as creating a constitutional right for individuals, entities, political committees and even candidates to engage in anonymous mass mailings or broadcast advertisements expressly advocating the election or defeat of a candidate or the adoption or defeat of a ballot measure. In the meantime, states are unnecessarily losing decision-making authority with respect to the conduct of their own elections and citizens are unnecessarily losing their ability to make informed electoral decisions. Unless this Court firmly establishes the narrow scope of *McIntyre*, we will be well on our way toward fulfilling Justice Scalia's dire prediction that "[i]t may take decades to work out the shape of this newly expanded right-to-speak-incognito, even in the elections field." *McIntyre*, 525 U.S. at 381 (Scalia, J., joined by Rehnquist, C.J., dissenting).

The narrow scope of *McIntyre* makes sense, because "in the case of a handbill written by a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader's ability to evaluate the document's message," *McIntyre*, 514 U.S. at 348-49, and disclosure exposes speakers to the risk of heat of the moment harassment only during one-on-one communications. When substantial resources are invested in direct mail or broadcast advertising, on the other hand, voters have a heightened interest in knowing who is financing the message, whereas heat of the moment harassment is impossible. Legitimate concerns about other forms of harassment can be remedied with as-applied exemptions from disclosure rules under *Buckley* and *Brown*.

When the "larger circumstances" of expensive, impersonal, mass communications are involved, disclosure requirements serve compelling government interests in providing information, preventing corruption (in candidate

elections), and aiding in the enforcement of other campaign finance laws. Disclosure requirements provide valuable information to the public about candidates and about the supporters or opponents of candidates and ballot measures, information that the average citizen has neither the time nor resources to ferret out and analyze. In addition, as *Survival Education Fund* recognized, disclosure also makes it easier for campaign contributors to comply with laws limiting the amount of contributions that individuals may make to candidates; a contributor who is unaware that an organization is soliciting funds with a candidate's authorization might inadvertently exceed the limit on contributions to the candidate when donating to the group. Finally, without disclosure, it is more difficult to uncover both the potentially corruptive influence of large contributions or expenditures in candidate campaigns and efforts to hide illegal expenditures behind anonymous individuals.

The interests in electoral integrity, an informed electorate, and compliance with the law are unquestionably concerns of the highest order. The federal and state governments should have the authority they need to advance those interests through reasonable reporting and disclosure laws. To protect that authority, this Court should clarify in this case that reporting requirements are constitutional, unless a party can demonstrate a record of harassment, and that disclosure requirements do not violate the First Amendment as long as pamphleteers and other advocates engaged in face-to-face communications are exempt.

CONCLUSION

For the foregoing reasons, we urge this Court to clarify the meaning of *McIntyre* in accordance with the analysis set forth above.

November 29, 2001

Respectfully submitted,

Richard L. Hasen
Counsel of Record
919 South Albany Street
Los Angeles, California 90015
(213) 736-1466

Burt Neuborne
Deborah Goldberg
Brennan Center for Justice
at NYU School of Law
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730

ATTORNEYS FOR AMICUS CURIAE